Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HERNAN BOTERO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO: 81-6018-Cr-ALH (s)

UNITED STATES OF AMERICA)	
)	18 USC §371
V.)	M/S - 5 years
)	and $10,000
HERNAN BOTERO)	18 USC §1001
ROBERTO BOTERO)	M/S - 5 years
LOSARDO RESTREPO,)	and $10,000
aka "LEE")	18 USC §1341
DOLORES EIRIN,)	M/S - 5 years
aka "LOLITA")	and $1,000
JOHN DOE, aka "WILLIS")	31 USC §§1081 &
RICHARD ROE. aka "DUKE")	1059
PETER POE, aka "OMAR")	M/S 5 years
ALBERTO CANO)	and $500,000
GERARDO MARRERO)	21 USC §952
JAIME GUSTAMANTE)	M/S - 15 years
ALBERTO MERI)	and $25,000
)	18 USC §2
)	

SUPERCEDING
INDICTMENT

The GRAND JURY charges that:

COUNT I

Between on or about October 1979, and on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE aka "WILLIS"
RICHARD ROE aka, "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, together with others both known and unknown to the Grand Jury, did unlawfully, willfully, knowingly, and intentionally conspire, combine, confederate and agree together and with each other to do the following:

(1) To unlawfully, knowingly, and intentionally defraud the United States, in particular the Internal Revenue Service, by impairing, obstructing, and defeating its lawful government functions of the collection of data and reports of currency transactions in excess of $10,000.00, for use in criminal, tax, and regulatory investigations and proceedings, and of the enforcement of those

laws and regulations found in Title 31 of the United States Code and Title 31 of the Code of Federal Regulations concerning the required reporting of currency transactions in excess of $10,000.00.

(2) To unlawfully, knowingly and intentionally falsify, conceal and cover-up, and cause to do so, by scheme and device, material facts in a matter within the jurisdiction of an agency or department of the United States, that is the Internal Revenue Service, in violation of Title 18, United States Code, Section 1001.

(3) To unlawfully, knowingly, and intentionally place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said

cashier's checks, for the purpose of executing a scheme and artifice to defraud, after having devised that scheme and artifice to defraud the United States, in particular the Internal Revenue Service, in violation of Title 18, United States Code, Section 1341.

(4) To unlawfully, knowingly, and intentionally fail to file and cause the failure to file of Currency Transaction Reports (IRS Form 4789) in connection with the deposits of United States currency in excess of $10,000.00 to various accounts at the Landmark First National Bank, as part of a pattern of illegal activity involving transactions exceeding $100,000.00, in a 12 month period, that is approximately $55,000,000.00, in United States currency between December 1979 and October 1980, in violation of Title 31, United States Code, Section 1081 and 1059.

The manner and means by which the said conspiracy was sought to be accomplished consisted of the following:

(A) That five bank accounts would be opened by HERNAN BOTERO and DOLORES EIRIN, at the Landmark First National Bank in five names other than that of the true owner, holder and users of the accounts.

(B) That large amounts of United States currency, well in excess of $10,000.00 for each deposit, would be deposited in these accounts between December 1979 snd October 1980, by the defendants herein.

(C) That IRS Forms 4789 would be prepared for these deposits by DOLORES EIRIN and by Alan Campbell and Gary Dodson listing the five names described above in (A) as the depositors even though those names were not those of the real depositors.

(D) That the original IRS Form 4789 would be destroyed by Alan Campbell and Gary Dodson and not mailed to the Internal Revenue Service as required by law, as under no circumstances was the Internal Revenue Service to know of these large cash deposits according to directions of HERNAN and ROBERTO BOTERO.

(E) That a copy of the false IRS Form 4789 would be kept at the Landmark First National Bank and would be shown to bank officials and to officials of the United States Comptroller of the Currency to avoid suspicion.

(F) That the funds on deposit in the five accounts would at first be distributed by Alan Campbell and Gary Dodson by means of wire transfers to various recipients designated by HERNAN and ROBERTO BOTERO, and later by withdrawals, conversion into cashier's checks and the mailing of the cashier's checks to

various recipients also designated by HERNAN and ROBERTO BOTERO.

(G) That according to the directions of HERNAN and ROBERTO BOTERO the United States Government was not to know of the generation of income in the form of United States currency by the defendants herein and others from the sale of their "product" in the United States, and that this income was to be removed from the United States as quickly as possible to Colombia through the Landmark First National Bank without the United States government's knowledge, despite the requirements of United States law, of which the defendants were aware.

(H) That an amount of United States currency of approximately $55,000,000.00, was to be "laundered" through the five accounts by the defendants herein; that is, the currency was to be deposited in and soon thereafter withdrawn from the

Landmark First National Bank in such a way as to illegally prevent the United States through the Internal Revenue Service from knowing the real persons and the amounts involved, in order to accomplish the removal of the currency from the United States as described in (G) above.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objectives thereof, the following overt acts among others were committed within the Southern District of Florida:

(1) In or about December 1979, HERNAN BOTERO met with DOLORES EIRIN, Alan Campbell, and Gary Dodson, and discussed the depositing of United States currency at the Landmark First National Bank without the filing of IRS Form 4789.

(2) From on or about December 31, 1979 until on or about October 1980,

HERNAN BOTERO, ROBERTO BOTERO, LOSARDO RESTREPO, JOHN DOE, RICHARD ROE, PETER POE, ALBERTO CANO, GERARDO MARRERO, JAIME BUSTAMANTE and ALBERTO MERI brought amounts of United States currency of approximately $55,000,000.00 to DOLORES EIRIN, Alan Campbell, and Gary Dodson to be deposited to five accounts used by the defendants at the Landmark First National Bank.

(3) From on or about January 1980 until on or about October 1980, Alan Campbell and Gary Dodson, according to directions of HERNAN and ROBERTO BOTERO that the United States Government not know of the deposits made at the Landmark First National Bank described in paragraph (2) above, prepared IRS Forms 4789 using false names, supplied by HERNAN BOTERO, destroyed the original form, and placed a copy in the files at the Landmark First National Bank.

(4) From on or about January 1980 until on or about February 1980, HERNAN BOTERO, DOLORES EIRlN, Gary Dodson and Alan Campbell caused United States currency to be wired from the accounts owned and used by the defendants herein at the Landmark First National Bank to accounts of other persons at various banks, according to the directions of HERNAN BOTERO.

(5) From on or about February 1980 until on or about October 1980, HERNAN BOTERO, ROBERTO BOTERO, DOLORES EIRIN, Gary Dodson and Alan Campbell caused United States currency to be withdrawn from the accounts owned and used by the defendants herein at the Landmark First National Bank, converted this amount to cashier's checks, and mailed said checks from the United States Post Office in Plantation, Florida to various individuals, according to directions of HERNAN BOTERO and ROBERTO BOTERO.

In violation of Title 18, United States Code, Section 371

COUNT II

Between on or about October 1979 and on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein, and others both known and unknown to the Grand Jury, did unlawfully, knowingly, and intentionally falsify, conceal and cover-up and cause to do so, by scheme and device, material facts within the jurisdiction of an agency or department of the United States, that is the IRS, which scheme and device included the following:

(A) That five bank accounts would be opened by HERNAN BOTERO AND DOLORES EIRIN, at the Landmark First National Bank in five names other than that of the true owner, holder and users of the accounts.

(8) That large amounts of United States currency, well in excess of $10,000.00, for each deposit, would be deposited in these accounts between December 1979 and October 1980, by the defendants herein.

(C) That IRS Forms 4789 would be prepared for these deposits by DOLORES EIRIN and by Alan Campbell and Gary Dodson listing the five names described above in (A) as the depositors even though those names were not those of the real depositors.

(D) That the original IRS Form 4789 would be destroyed by Alan Campbell and Gary Dodson and not mailed to the

Internal Revenue Service as required by law, as under no circumstances was the Internal Revenue Service to know of these large cash deposits according to directions of HERNAN and ROBERTO BOTERO.

(E) That a copy of the false IRS Form 4789 would be kept at the Landmark First National Bank and would be shown to bank officials and to officials of the United States Comptroller of the Currency to avoid suspicion.

(F) That the funds on deposit in the five accounts would at first be distributed by Alan Campbell and Gary Dodson by means of wire transfers to various recipients designated by HERNAN and ROBERTO BOTERO, and later by withdrawals, conversion into cashier's checks and the mailing of the cashier's checks to various recipients also designated by HERNAN and ROBERTO BOTERO.

(G) That according to the directions of HERNAN BOTERO and ROBERTO BOTERO the United States Government was not to know of the generation of income in the form of United States currency by the defendants herein and others from the sale of their "product" in the United States, and that this income was to be removed from the United States as quickly as possible to Colombia through the Landmark First National Bank without the United States Government's knowledge, despite the requirements of United States law, of which the defendants were aware.

(H) That an amount of United States currency of approximately $55,000,000.00, was to be "laundered" through the five accounts by the defendants herein; that is, the currency was to be deposited in and soon thereafter withdrawn from the Landmark First National Bank in such a way as to illegally prevent the United

States through the Internal Revenue Service from knowing the real persons and the amounts involved, in order to accomplish the removal of the currency from the United States as described in (G) above.

In truth and in fact, as the defendants herein well then knew: the said five bank accounts opened at the Landmark First National Bank were owned, used and held by HERNAN BOTERO; the deposits to these said accounts were being made or caused to be made by the defendants herein; the IRS Forms 4789 were not being filed with the Internal Revenue Service as required by law because of the defendants' aforementioned scheme and device and despite the defendants' knowledge of the requirements for proper filing with the Internal Revenue Service of all cash transactions at the Landmark First National Bank that were in excess of $10,000.00.

In violation of Title 18, United States Code, Section 1001; Section 2.

COUNT III

During on or about June 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE''
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes con-

taining the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

(A) That five bank accounts would be opened by HERNAN BOTERO and DOLORES EIRIN, at the Landmark First National Bank in five names other than that of the true owner, holder and users of the accounts.

(B) That large amounts of United States currency, well in excess of $10,000.00, for each deposit, would be deposited in these accounts between December 1979 and October 1980, by the defendants herein.

(C) That IRS Forms 4789 would be prepared for these deposits by DOLORES

EIRIN and by Alan Campbell and Gary Dodson listing the five names described above in (A) as the depositors even though those names were not those of the real depositors.

(D) That the original IRS Form 4789 would be destroyed by Alan Campbell and Gary Dodson and not mailed to the Internal Revenue Service as required by law, as under no circumstances was the Internal Revenue Service to know of these large cash deposits according to directions of HERNAN and ROBERTO BOTERO.

(E) That a copy of the false IRS Form 4789 would be kept at the Landmark First National Bank and would be shown to bank officials and to officials of the United States Comptroller of the Currency to avoid suspicion.

(F) That the funds on deposit in the fivs accounts would at first be distributed by Alan Campbell and Gary Dodson

by means of wire transfers to various recipients designated by HERNAN and ROBERTO BOTERO, and later by withdrawals, conversion into cashier's clecks and the mailing of the cashier's checks to various recipients also designated by HERNAN and ROBERTO BOTERO.

(G) That according to the directions of HERNAN and ROBERTO BOTERO the United States Government was not to know of the generation of income in the form of United States currency by the defendants herein and others from the sale of their "product" in the United States, and that this income was to be removed from the United States as quickly as possible to Colombia through the Landmark First National Bank without the United States Government's knowledge, despite the requirements of United States law, of which the defendants were aware.

(H) That an amount of United States currency of approximately $55,000,000.00 was to be "laundered" through the five accounts by the defendants herein; that is, the currency was to be deposited in and soon thersafter withdrawn from the Landmark First National Bank in such a way as to illegally prevent the United States through the Internal Revenue Service from knowing the real persons and the amounts involved, in order to accomplish the removal of the currency from the United States as described in (G) above.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT IV

During on or about July 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"

JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of COUNT III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT V

During on or about August 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's

checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT VI

During on or about September 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United States, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Pararaphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

COUNT VII

During on or about October 1980, at Plantation, Broward County, within the Southern District of Florida,

HERNAN BOTERO
ROBERTO BOTERO
LOSARDO RESTREPO aka "LEE"
DOLORES EIRIN, aka "LOLITA"
JOHN DOE, aka "WILLIS"
RICHARD ROE, aka "DUKE"
PETER POE, aka "OMAR"
ALBERTO CANO
GERARDO MARRERO
JAIME BUSTAMANTE
ALBERTO MERI

defendants herein and others both known and unknown to the Grand Jury, unlawfully, knowingly and intentionally did place

and cause to be placed in an authorized depository for mail matter, cashier's checks of the Landmark First National Bank of Broward County, Florida, to be sent or delivered by mail according to the directions placed on envelopes containing the said cashier's checks, for the purpose of executing a scheme and artifice to defraud, which scheme and artifice was devised to defraud the United Statas, in particular the Internal Revenue Service.

Said scheme and artifice included the following:

Paragraphs (A) - (H) inclusive of Count III of this Indictment are incorporated by reference herein as if set out in full.

In violation of Title 18, United States Code, Section 1341; Section 2.

* * *

* * *

THE COURT: So the record will be clear, when you stated on the record, precisely what you anticipate Mr. Campbell will testify to so that we won't force the appellate court into looking into previous records--

MS. WILLIAMS: I'll ask Mr. Campbell if there came a time when the deposits dropped off. He'll say yes. I'll say when was that? Sometime around May. Did you have a discussion with anyone about that? Yes. Who? Losardo Restrepo. Where was it? It was in the bank. I believe he'll say by the vault. Was there anyone else present? I think Gary Dodson but I can't be sure.

What did Mr. Restrepo say? What did you say? I'll say why have the deposits dropped off and--

THE COURT: When approximately was this, in March of '80?

MS. WILLIAMS: May of '80.

He said before the deposits were coming in two or three times a week and then--and they weren't coming in any more. So he said why are the deposits dropping off? Mr. Restrepo said it's because of the Mariel Boatlift. All the boats out there and they can't get through. One of Mr. Botero's boats was seized. Meaning--and he will clarify as he did in the last trial meaning Hernan Botero. That's it.

THE COURT: Okay.

MR. SHOHAT: Your Honor, Hernan Botero would object on several grounds.

THE COURT: I assume--

MR. SHOHAT: To the testimony.

THE COURT: --for the purposes of the record that the Government is offering the statement into under 801(d)(2)(e); am I correct?

MS. WILLIAMS: Correct, Your Honor.

THE COURT: All right.

MR. SHOHAT: So it's being offered, then, as a non-hearsay statement under Rule 801(d)(2)(e), as a statement made by a conspirator during the course of and in furtherance of the conspiracy, which leads me to the first ground of our objection that while the subject matter may be interesting, there is no indication that anyone connected with the conspiracy, and Mr. Campbell, acted upon the information or intended to act upon the information or was asking the question for anything more than informational purposes so that the statement by Mr. Restrepo, while interesting, is not in furtherance of the conspiracy. It might add some sort of color to the conspiracy but it certainly doesn't further it. Not furthering the conspiracy that's charged in the indictment, which remember now, is a conspiracy to make a false statement

under 1001, not furthering that conspiracy it does not in any respect meet the fundamental indicia of reliability required by 801(d)(2)(a). That's why that rule says that coconspirator hearsay statements are reliable because they further some object of the conspiracy.

We don't see and we contend that that particular statement does not further any object of the conspiracy.

Second. There are other problems with the reliability of the statement, and that is that based on the information of which we're aware concerning the statement and the proffer of the Government, there is no evidence to indicate that my client, Mr. Botero, our client, Mr. Botero, had any connection whatsoever with the statement except the part of the statement that says one of Mr. Botero's boats was seized.

Where does the declarant get his information? A central part in addition to the in-furtherance requirement of the exception to the hearsay rule and all exceptions to the hearsay rule are indicia of reliability.

Here we have a declarant, Mr. Restrepo, whose only connection to the case is as a runner, he's not otherwise through testimony or otherwise being placed in any connection or relationship directly with Mr. Botero. In fact, there isn't any evidence and I don't believe there will be any evidence to connect him directly to Mr. Botero in any respect. There's no evidence, for example, that Mr. Botero handed him the money or gave him his instructions personally what to do or anything of that nature. So, where is the information he's getting coming from? How does he know? That's not

contained within the statement and is therefore missing a second indicia reliability that is apparency of the source of the information in the declaration. Two indicia of reliability are missing.

The second one also leads me to our third objection, and that is that I always learned and thought that there was a right to confront one's accusers, and especially where at least there is an arguable case that some indicia of reliability which is otherwise existent in co-conspirator hearsay cases in the normal sense of those declarations as they're used in this court, we should have a right to confront this Mr. Restrepo and have him--and cross-examine him as to his source of this information, especially if it's being offered against Mr. Botero. Whereas, one might normally say that the right of confrontation is to

some extent satisfied by the indicia of reliability, the teaching of such cases is Pointer vs. Texas, Davis vs. Alaska, and a case in the Ninth Circuit which I just had a very recent experience called United States vs. Tilly, which specifically holds that after the 801(d)(2)(e) determination is made, a defendant has a right to question his right, assert his right to confront the statement, and that's a separate determination for the Court.

I suggest that especially where there is some question of the reliability of the statement as we have pointed out the defendant's right to confrontation is implicated and the Court ought to be very careful under these circumstances not to deprive Mr. Botero of his right to confrontation. This is not, I repeat, a normal co-conspirator hearsay situation. This is a situation where we can argue,

and I don't think anyone can dispute that there is some question about the reliability of this statement. Just because he walks into the bank and says, "Hey, this is what happened and the reason why it slowed down," without giving us any information as to the source of the statement, and not really being in furtherance of anything, at least it being arguable we believe there's a real question as to its reliability and we assert a right to confront our accusers in this particular situation.

I would also point out to the Court that based on information available to us, and I don't think the Government will dispute that, there might be good reason for Mr. Restrepo to do a little bit of his own puffing in making up in conversations with Mr. Campbell and that is he was attempting to convince Campbell and Dodson and the people at the Landmark

Bank to get involved in his own money-laundering scheme.

And, while I'm not as familiar with this aspect as Mr. Sonnett is, it's my understanding that they did in fact get involved in some sort of a money-laundering scheme with Mr. Restrepo. So, there may have been reasons for him to cast some doubt about the future of business with Mr. Botero.

I'm not sure about this and everybody here can correct me but I believe there is some indication that Mr. Restrepo was trying to steal this situation for himself somewhere along the line. Maybe Mr. Sonnett can add to that.

MR. SONNETT: Well, I think Your Honor remembers the facts in the last trial. Mr. Restrepo did in fact ask Mr. Campbell if he would accept deposits and separate accounts were set up for him, and that's why when Mr. Campbell gave his

first answer he said he used the figure of 70 or 75 million rather than the 55 million that's in issue in this case, because there did come a time when Restrepo asked whether or not he could daposit his own money and specifically said "I don't want Mr. Botero to know about this," according to Campbell's testimony at the last trial.

Ed pointed out some of the cases under the--

THE COURT: When did that occur?

MR. SONNETT: Excuse me?

THE COURT: When did that occur?

MR. SONNETT: I think it was in August.

Was it--do you remember the--

MS. WILLIAMS: I'm sorry, Your Honor, I didn't hear--

MR. SONNETT: The date when he set up his own--when he asked Campbell to set up his own accounts.

MS. WILLIAMS: Losardo Restrepo never set up his own accounts late in the October, September--sometime before that time he sent money through the already existing--

MR. SONNETT: Well, there was the Erdinada accounts, but I thought that his deposits came somewhere around August; is that correct?

Okay. I think I have the time frame proper.

The point that Ed was making to the Court is that there's a two-step process here. You start with the 801(d)(2)(e) analysis and determine whether or not it's made during the course of the conspiracy, it is, and whether or not it's made in furtherance of the conspiracy, and it's not. And, frankly, I have read the argument that was made before the Court during the last trial and I still fail to see how the Governmant justifies

this as a statement being made in furtherance of the conspiracy.

It clearly is the kind of chit-chat that the cases all exempt from 801(d)(e) furtherance of the conspiracy tests.

But, even if Your Honor rules that it's an 801--that it meets the 801(d)(2)(e) tests, not only in terms of furtherance but in terms of the indicia of reliability, there still is a separate objection that has to be handled by the Court that was never raised in the last trial and that's the confrontation clause.

And, in addition to the cases that Ed cited, California vs. Green and Pointer vs. Texas and Dutton vs. Evans pretty clearly state that there has to be a separate analysis made even if it meets an 801(d)(2)(e) test and that the Court has got to find not just that the statement is reliable, because that's the test

under 801(d)(e), but that it's very reliable, I think is the language. I don't have the case in front of me, unfortunately, because I didn't expect to argue this today, but that it's very reliable. And, as Ed pointed out, we don't have any basis upon which to say that it was very reliable. We know that Mr. Restrepo was at a later time doing business in competition or attempting to do business or to make deposits that he specifically did not want Mr. Botero to know about, as Ed pointed out, we do not know what the source of his information was or all of the available information indicates that all he was was a courier or a runner--that's the way he's been characterized here--whose sole function in this conspiracy was to deliver money to the bank. So, there's no basis on which the Court can conclude that he had any knowledge that he had had a conversa-

tion with anybody, that he had talked to Hernan Botero or anybody else, from which he could make a reasoned view. It could have been just his own opinion, which is not made clear in the testimony at all. And for that reason it miserably fails the Dutton vs. Evans test of very reliable.

And the confrontation clause issue I think is even more important. Now, Mr. Houlihan, during the break said, well--and I asked him to say it to the Court and I presume, I suppose he will--we're not offering this for the truth of it, which raises yet another problem under 403, because there's no way that this statement can be offered not for the truth of it and any kind of instruction given to this jury that's not going to confuse them--and yet that's tha Government's position. I don't understand that.

THE COURT: Let me hear that.

MR. SONNETT: Isn't that what you--

THE COURT: Let me hear from Ms. Williams or Mr. Houlihan.

Correct me if I'm wrong. The Sixth Amendment argument was not made on the last occasion.

MS. WILLIAMS: No. It wasn't.

THE COURT: Is the statement being made or offered under 801(d)(2)(e)?

MS. WILLIAMS: Yes, it is, Your Honor. It is not a non-hearsay statement, it is a not-hearsay statement offered under 801(d)(2)(e).

THE COURT: So, being offered for the truth of the matter asserted.

MS. WILLIAMS: It is not hearsay; yes.

THE COURT: So whatever Mr. Houlihan said to you before is not being said on this record.

MS. WILLIAMS: Your Honor, the statement was made by Mr. Losardo Restrepo. Mr. Restrepo is an indicted co-conspirator in this indictment in this case. According to the case law cited by the Government in Roberto Botero's trial and the case law I will cite now again with a further case cite, this is a classic 801(d)(2)(e) statement.

THE COURT: I'm not terribly concerned about that. I realize that Mr. Sonnett and Mr. Shohat are taking a strong position on that. I think it's a close question, but I resolved it the last time was an 801(d)(2)(e) statement and I'm prepared to do so again. But I am concerned that regardless of that fact, there has been at least a recent trend , not one of which by the way that was argued in the last case, of the Sixth Amendment aspects of this. Regardless of the fact that it the test in furtherance

of the conspiracy, what about the Sixth Amendment confrontation problem?

MS. WILLIAMS: Your Honor, it is the Government's position that any Sixth Amendment problems as argued by the defense attorney is embraced and addressed by the rule itself within the body of the committee notes of 801--

THE COURT: A substantial amount of authority says that isn't true--

MS. WILLIAMS: Your Honor, I believe California vs. Green is even discussed in the committee notes discussing the fact that the Supreme Court views 801 as substantive evidence without the strictures of having to refer to confrontation clause or any of the other clauses. The 801(d) (2)(e) format, the three levels that you have to meet before you can enter such statements into evidence embraces the problems that the right to confront would also address. It ambraces the problem of reliability.

THE COURT: Are there not a series of cases that have come down since the adoption of this rule which have recognized the existence of the rule, the admissibility of the evidence under the rule and have still held that in fact the confrontation clause of the Sixth Amendment has not been met and therefore the evidence is inadmissible?

MS. WILLIAMS: Your Honor, frankly, I am unaware of any cases that would address that point in this context. I do not understand, however, how the rule could remain viable if an argument based on the facts of this case were accepted by the Court as the defendant has proposed.

For instance, if you have a case that is severed and you have statements from co-conspirators, where again does the right to confront come into play and how is that resolved?

I believe that those questions are resolved within the ambit of the rule itself. It is not hearsay, it is reliable information. The reason it is reliable is because it is being exchanged between co-conspirators during the course of a conspiracy and in furtherance of a conspiracy.

Furthermore, case law is--has been cited by the Government and I will cite again that the statement need not even further the conspiracy just so long as when made it was meant to promote the objectives.

The cases in this circuit that have examined the problem of 801(d)(2)(e) have even gone to the point where they have discussed the co-conspirator's statement, and the courts--and I would cite this Court to United States vs. Miller, Fifth Circuit. The court went on to say that the statements could have been meant to

do this, or the statements could have been meant to do that.

Clearly embellishing over or ignoring or accepting the fact that the right-to-confront argument is embraced by 801(d)(2)(e), the idea being that the statements on their face, and because of the situation that being a conspiracy, and a conversation between co-conspirators gives these statements the reliability the indicia of reliability which hearsay does not have.

Now, in this instance, we have an indicted co-conspirator who was a runner for Hernan Botero. He came in the first day when Hernan Botero came in and gave $3,000 to Campbell, Dodson and Eirin, and brought in the money.

We have another conspirator concerned, why have the deposits dropped off, and in response he is given an explanation, and, indeed, if you look at

the court exhibit, the deposits dropped off dramatically in May; another indicia of reliability. It is not chit-chat, it is not puffing, it is indeed statements made to allay the fears of co-conspirators to inform them of the status at that time of the conspiracy and as such, under the rules and under the appropriate case law, is admissible.

I do not think that tha right-to-confront issue is engaged in this instance, and I certainly think that the case law in this circuit has not recognized that being a problem on these facts and in this particular instance, where you have an indicted co-conspirator, a runner for the conspirator on trial, talking to other conspirators about why the money hasn't been coming in. That, indeed, is the whole focus of the conspiracy, the flow of the money.

THE COURT: I'm just reading from Salsberg's cumulative supplement to the third edition, which was just put out in August of '84, in which he comments that Justice White dissented in Sampson vs. United States, noting that circuit are divided on whether conspirator statements that fall within the rule require a case-by-case analysis of reliability.

So, obviously, there is in fact a lot of cases which in fact do recognize the statement being offered comes within the ruling, yet there is a Sixth Amendment confrontation clause.

MS. WILLIAMS: Your Honor, I know of no Eleventh Circuit case, perhaps if there is one recent or if there is one--

MR. SONNETT: Here's one case, Your Honor. It's called Ohio vs. Roberts, 1980. I have the cite here.

May I read to the Court from United States vs. Tilly, which is a recent case

from the Ninth Circuit, 729 F.2d 615, decided in the Ninth Circuit on March 29th, 1984.

First, let me just revisit--

THE COURT: But in that case they admitted the Sixth.

MR. SONNETT: Yes, sir. But it was a different kind of statement. I mean I can tell you what the statement was.

THE COURT: Okay, but how--

MR. SONNETT: Whether or not somebody should be guilty because they're cooperating with the Govarnment. But--

THE COURT: Just a second.

MR. SONNETT: First on the issue of the 801(d)(2)(a) on whether or not it qualifies, the rule stated by the Ninth Circuit is as follows: Statements are in furtherance of the conspiracy if they are intended to further its objectives. Mere conversations--that's in quotes--"Mere conversations" between co-conspirators

"merely narrative declarations" and "casual admissions of culpability" are not statements in furtherance of the conspiracy.

Now, in this case they go on to talk about the nature of the statements here. The tape that was sought to be admitted, included speculation that a former employee was cooperating with the Government. One of the declarants suggested that he arrange for him to be killed and they discussed what story to give authorities if they wera questioned. That certainly is in furtherance of the conspiracy.

Contrast that with what we have here, where we have merely kind of a casual statement in answer to the question "Why are deposits slowing down?" "It's the Mariel Boatlift. There are so many boats out there are so many boats out there, and one of Hernan's boats got

seized, or one of Mr. Botero's boats got seized."

Now, leaving tha 801(d)(2)(e) question, let's go directly to Your Honor's question about the confrontation clause. From United States vs. Tilly, at Page 621: "Satisfaction of the requirements for admission as a co-conspirator statement does not eliminate confrontation-clause questions. Citing United States vs. Arboles in the Ninth Circuit; United States vs. Frishbin in the Ninth Circuit; United States vs. Perez in the Ninth Circuit; United States vs. Brunow in the Ninth Circuit.

THE COURT: All right. There's no question that the Ninth Circuit follows-- They then put you through the two-part test of unavailability of the witness--

MR. SONNETT: And reliability.

THE COURT: And reliability.

MR. SONNETT: And under--

THE COURT: My guess is, has the Eleventh Circuit adopted that position or are they in fact sticking with the line of cases which doesn't go through that situation?

MR. SONNETT: Well, as far as I know, since--

THE COURT: That's what we're boiling down to.

MR. SONNETT: Since the United States Supreme Court in Ohio vs. Roberts adopts that test, the Eleventh Circuit has got to adopt that test.

The next quote here is we apply a two-part test to confrontation-clause issues. Unavailability of the declarant and reliability suggested by the circumstances of the statement. Ohio vs. Roberts, and the cite.

Unfortunately, the first case I could pull out was a Ninth Circuit. I'm looking to see if there's a Fifth Circuit

case or an Eleventh Circuit case cited here, and I don't see one.

But they cite the Dutton vs. Evans and they cite Ohio vs. Roberts.

I happen to have in the tape deck in the car Professor Younger's lecture on confrontation, which I finished listening to on the way to the courthouse this morning. He goes through an entire discussion of the evolution of that rule and the fact that California vs. Green was followed close on the heels by Pointer vs. Texas, and then further replying by Dutton vs. Evans, and the reason that it was refined in those three cases is because of exactly what Ms. Williams pointed out, and that is California vs. Green seemed to indicate that all hearsay statements violated the confrontation clause and that would do harmful damage to 801(d)(2)(e), so they refine it a little further in Pointer vs. Texas and

further in Dutton vs. Evans, and the test used in Dutton vs. Evans was whether or not the statement can be held to be very reliable.

I think that's the quote from the case, but we can pull the case from your chambers and see if my recollection from the tape recording is correct.

And under that analysis--Your Honor admits that it's a close case even under 801(d)(2)(e). It becomes a lot closer when you examine it in the twopart process that deals with the confrontation-clause issue.

MR. SHOHAT: I'd like to interject a couple of brief matters.

In Ms. Williams' argument she made the contention that this statement was made somehow to allay the concerns of Mr. Campbell.

Mr. Campbell isn't going to testify to that. He's never said that anywhere.

He never said anything more than he had a conversation in which the statement was made. Not that it had any identifiable purpose whatsoever to anything that he was doing in connection with this conspiracy. That's No. 1. And No. 2.

No. 2 is--I don't think Mr. Sonnett intended to say this or imply this, but certainly there is a Rule 403 element to this objection. While we cite to the confrontation clause, one of the things that Rule 403 prohibits is unfair prejudice where evidence is otherwise legally and logically relevant. Otherwise. But we contend, and I think it's fair for us to contend, that without knowing the source of this information, without other --reliability information, this would be unfairly prejudicial to Mr. Botero to admit it, under the circumstances, especially where, as the Court concedes, the admissibility on the 801 question is itself a close question.

How does Hernan Botero deal with this man Restropo and what he said, and isn't he at least entitled to have the statement admitted only under circumstances where we know what the declarant's source of the information is?

MR. SONNETT: And, one other point ought to be made, Judge, and that is--I know it's got to be troublesome to consider ruling in a different manner on the same issue in two different trials, but I think Your Honor has to remember that the dynamite impact of that statement as to Hernan Botero presently on trial is much more severe than it would have been to Roberto Botero, who was then on trial, since his defense largely was if anything was done wrong, it was done by Hernan. That was what Joel argued in cross-examination, in opening statement and in closing statement. But you can't visit the sins of the brother.

So the dynamite or the prejudicial impact, even in a close case, could not be held to be as severe against Robert Botero as it would be against Hernan Botero. With Mr. Hernan Botero on trial in this case, the statement by Mr. Restrepo, who I suppose under the case law can be held to be an unavailable declarant, but we can't get past the reliability issue. Saying that one of Hernan's boats got seized is a dynamite piece of evidence, when admitted for the truth. And now the Government takes the position that they are trying to admit it for the truth. And, given the closeness of the question and the severe impact that it has, I think that it's appropriate for the Court to come down on a different side of the issue in this case. This is a different trial involving a different defendant who will be impacted differently than Roberto Botero was.

MS. WILLIAMS: Briefly, Your Honor.

Every case that I am aware of, and I'm not trying to mislead the Court that there's not a more recent case or something Linda Hurtz might be able to provide us with, but every case I am aware of from the Eleventh Circuit since Ohio vs. Roberts has held the way the Court held in the prior trial, three conditions of 801(d)(2)(e) are met the statement is admissible. Conspiracy law addresses this squarely.

There is a problem with the Government proving up conspiracy. It's having your hands tied. There is a disability to that. Because of that 801(d)(2)(e) was introduced and it was adopted.

Now, according to the case law I will cite His Honor to United States v. Amar which was cited in the last trial. Statements between conspirators which provide reassurance serve to maintain

trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the end of the conspiracy and are admissible so long as the requirements of Rule 801(d)(2)(e) are met.

I might point out in that case the statement in question had been made after an arrest, supposedly, you know, after a conspiracy had been ended and was with regard to procuring bail from the proceeds of drug sales. The court said the in-furtherance requirement must be given the same practical interpretation as the pendency requirement during the course. The distribution of the proceeds of a conspiracy, exactly what is happening here, distributing the money into the five accounts without filing CTR's, is one of its central objectives in statements which are directed to that purpose must be considered to be in furtherance

of the conspiracy. Again, U. S. v. Miller, the Fifth Circuit. The court has noted that the in-furtherance of the conspiracy must not be applied too strictly less we beat the purpose of the exception, addressing the disabilities that the Government has coming in to proving up conspiracy cases. Puffing, boasts and other conversations are admissible when used to obtain the confidence of the one involved in a conspiracy. Also statements meant to allay the suspicions.

And then the court goes on in a specualtory (sic) manner it may seem. He may have meant this; he may have meant this. But, clearly, in the context, an indicted co-conspirator, one of the first runners brought in by Hernan Botero, consistently bringing in money known to be from Hernan Botero, when questioned directly by another co-conspirator

because the deposits had dropped drastically, "Where is the money? Why are we not getting the money?", says, "The boatlift. One of the boats was seized."

You heard his other testimony. "I have a product. It comes in by boat and it comes in by air." There could be no stronger reliable basis for the admission of the statement than the evidence that is before this jury and that will go before this jury.

THE COURT: All right. Let me ask a question--

MR. SONNETT: May I just make--

THE COURT: Yes, but let me ask a question. So the record is absolutely clear, with regard to Mr.Restrepo, Mr. Restrepo is unavailable. Is that not correct?

MS. WILLIAMS: Very much so.

THE COURT: There's no question about his availability--

MR. SONNETT: I don't--I don't think-

THE COURT: --to the Government.

MR. SONNETT: I don't think I can argue his unavailability.

MS. WILLIAMS: Mr. Restrepo is a fugitive.

THE COURT: You mean he's available.

MR. SONNETT: Well, that issue.

THE COURT: Right. Okay.

MR. SONNETT: That's not the issue--

THE COURT: All right.

MR. SONNETT: --which I argue.

THE COURT: All right.

MR. SONNETT: The case that Kathy just read points up the difference here. There can be no suggestion that the conversation that was held in this case either was held to gain the confidence of a co-conspirator, since Mr. Restrepo had been bringing in money 60 percent of the

time from December 31 until May, five months; nor can there be any suggestion that he was doing it to allay fears of a co-conspirator, because this was not a fear, this was a curiosity. How come the money's droppad off? How come you guys aren't making deposits? He's not doing either one of the two things that are suggested in there.

No. 2 is this is no Itzar (phonetic) case. And the other case that I think Kathy cites sounds to me an awful lot like an Itzar case when you're talking about distribution of the proceeds of a drug enterprise. That's not what the charges are in this case.

The Government had the option to charge 1951 if they wanted to, and they didn't in this particular indictment.

But the third argument I wanted to make, if it doesn't slip away from me--and it just slipped away from me. Okay.

THE COURT: I'm going to give you a chance to retrieve it because I'm going to go to my chambers for a few minutes.

All right, the Court will be in just a brief recess.

(Recess taken.)

THE COURT: Okay.Mr. Shohat, do you want to go forward?

MR. SHOHAT: Yes, sir.

Your Honor, I ask you to recall once again the statement that we are talking about.

Witness Campbell relating what unavailable or out-of-court witness Restrepo is supposed to have said to him.

Restrepo says that the reason why the money has slowed in coming in to the Landmark Bank is because of the Mariel Boatlift and one of Mr. Botero's boats has been seized. Their summation of the declaration that is at issue, I believe.

In our prior argument we raised the question that there is a serious question both from a confrontation standpoint and under the weighing test of Rule 403 because, among other things, the source of the declarant's information is unknown.

On the issue of the source of the declarant's information being unknown, we contend that the statement itself is inadmissible on its face under Rule 602 of the Federal Rules of Evidence, which provides, and I quote:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he, the witness, has personal knowledge of the matter."

Now, the rule then goes on to discuss what evidence there may be of personal knowledge. One might say, as I am

sure you might be saying to yourself right now, but wait a minute. Mr. Campbell is saying what his source of information is, and he's the witness. However, that's not the analysis.

The analysis is consistent with Rule 805, hearsay within hearsay; that what we are talking about here, Judge, is a declaration by Mr. Campbell, testimony by Mr. Campbell that it is itself an out-of-court statement being offered for its truth and, therefore, hearsay, that is based itself on hearsay, because Mr. Restrepo does not say that he has first-hand knowledge of this information and there is nothing in this record from which one might conclude that Mr. Restrepo has first-hand knowledge of this information that he is relating to Mr. Campbell.

It is a hearsay within hearsay problem under Rule 805.

Under that rule, a statement can be admitted only if both the hearsay, the statement of Restrepo, and the hearsay on which it is based meet the indicia of reliability required by the Federal Rules of Evidence, and we suggest that because they don't even meet Rule 602, they can never meet that indicia of reliability.

But this isn't just our idea. This very proposition was discussed in the case of United States versus Lang, 589 F.2d. Second Series, 589 F.2d., Page 92, a Second Circuit case, decided in 1978, and I can't express it any better than they did. They were not dealing with the co-conspirator exception to the hearsay rule, they were dealing with the declaration against penal interest exception.

After determining. that the unavailable declarant, the statement

attributed to the unavailable declarant, in that case a fellow by the name of Carey, in this case a fellow by the name of Restrepo, was in fact admissible on its face under Rule 804(b)(3); that is, declaration against penal interest. The court went on to note:

> "Despite our holding that Carey was an unavailable witness and that his statement was against penal interest within Rule 804(b)(3), we nonetheless hold that the admission of the tape constituted error requiring a reversal of the conviction.
>
> "Although that rule does not expressly incorporate a requirement that the declarant have personal knowledge of the facts to which the statement relates, Federal Rule of Evidence 602 states that:

> "'A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.'
>
> "The advisory committee note to Rule 803 specifically provides:
>
> "'In a hearsay situation the declarant is of course a witness.'"

In this case the declarant is Mr. Restrepo, and neither this rule or Rule 804 dispenses with the requirement of first-hand knowledge. It may appear appear from the statement or be inferable from the circumstances, see Rule 602.

The requirement of first-hand knowledge has always been inherent in the statement against interest exception.

While we suggest, Judge, that it likewise as to be inherent in the declaration of the co-conspirator exception because what we are dealing with here is an issue of whether or not the declarant who becomes a witness through his declaration has first-hand knowledge of the matter which he is discussing and which is being offered as, let's face it, dynamite evidence against Mr. Botero.

And we suggest that under Rule 602, it does not. Thank you.

THE COURT: Does the Government want to reply?

MS. WILLIAMS: Your Honor, aside from the obvious distinction that we are not again dealing with rule addressing co-conspirator statements and we are not addressing the peculiar nature of introducing conspiracy and co-conspirator statements, I can't think of an instance

that would guarantee what Mr. Shohat purports that this Court adopt as a rule for admissibility.

I can think of no instance to introduce a statement of a co-conspirator where within the body of that statement it is also revealed that this person has specific knowledge and/or was there at the scene or knows that for a fact, aside from Mr. Restrepo saying, "Alan, the boat was stopped. I know it for a fact, I was on the boat."

There is evidence, however, to show knowledge and reliability, and that is the evidence that is embraced and understood by the rule, and the Government has laid the foundation and given it to the Court.

Losardo Restrepo is a named indicted coconspirator. Alan Campbell and Gary Dodson will say more than any other runner, he brought in Herman

Botero's money on a regular basis. He was introduced on the first day. He came into the bank and deposited more money than any of the others, money being controlled and brought into the bank through the direction of Hernan Botero.

THE COURT: Wait a minute. He was introduced by whom on the first day?

MS. WILLIAMS: Mr. Campbell, frankly, says he doesn't know if Mr. Botero walked the runners in or they came in on their own. I can't say that Mr. Botero actually brought the runners in.

THE COURT: Is there going to be any evidence from the Government that can?

MS. WILLIAMS: That says the runners were brought in by Mr. Botero?

I think--we are not sure. We would have to review--- Mr. Houlihan believes that Mr. Dodson did testify to that fact.

But for purposes of argument, if the Court wishes to go on the premise that no Government witness will say Hernan came in with Losardo, Mr. Campbell said before the money came in, he was told by Delores that Hernan called, or Hernan called him, saying the money is coming in, and two hours later the money came in with Losardo Restrepo. And an hour after that Hernan Botero came in and wrote a check for precisely three-quarters of one percent of the deposit and Losardo Restrepo continued to bring money in to the account and Hernan Botero continued to call.

So aside from Mr..Restrepo saying-- I'm not sure how to fit into the rule, promoted by the defendant. Hernan told me that his boat was seized-- would that be satisfactory, or would he have to say I was on the boat was seized and Hernan told me it was his boat, or I'm not sure

what else. We have complied with James requirement, we have complied with the--the Government believes all the requirements of 801(d)(2)(e). I can think of no other indicia criteria of reliability than has been set forth, and I think that all the cases accept that and would find this statement admissible under 801(d)(2)(e).

THE COURT: The notes of the advisory committee under 602 state:

> "The rule does not govern the situation of a witness who testifies to hearsay statement as such if he has personal knowledge of the making of the statement."
>
> "Rule 801 and 805 ould be applicable.
>
> "This rule would, however, prevent him from testifying to the subject matter of the hear-

say statement as he has no personal knowledge."

What does that mean, Mr. Shohat?

MR. SHOHAT: I think that's exactly our point, but remember, we are not just talking about the hearsay statement of Mr. Restrepo. Even assuming for argument purposes, Judge, that Mr. Restrepo is reliable, what that rule says is that Mr. Campbell can't testify to another hearsay statement which is clearly the one we are talking about here.

THE COURT: Well, wait a minute.

805 says "Hearsay included within hearsay is not excluded. Under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules."

MR. SHOHAT: What, Judge, hearsay exception does Mr. Restrepo's statement--

THE COURT: Statement made in furtherance of the conspiracy.

MR. SHOHAT: What if Mr. Restrepo came into the court and said, "Judge, I heard this, I just heard it," which is all we really have, I don't know what the source of information is, I just heard this fact?

You see, the source of the substance of the statement that is that Mr. Botero's boat was seized through the Mariel Boatlift, the source of the actual meat of the statement is not Mr. Restrepo. It is someone talking to Mr. Restrepo whom we don't have identified.

THE COURT: Well, the difficulty I have in trying to analogize it to 804 is that from the standpoint of 804(b)(3), which is, I think, what you were talking about, that is a situation of the statement of the declarant being unavailable as a witness.

"The following are not excluded by the hearsay rule if the declarant is unavailable as a witness. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

It seems to me that there is a lot more criteria that are imposed upon the reliability of the statement made under 804(b)(3) so as to give rise to an application of 805 and 602. Then you do have it under 801.

MR. SHOHAT: That may be true as a general defense, but remember, Judge, we are not dealing with just a normal 801 statement. I think--our argument, we could concede, requires. the Court to recognize, as I think the Court has, that the issues of reliability vel non of Mr. Restrepo in these terms are viable issues because we don't know who his source of information was and because there is at least a very arguable question albeit one you have identified or ruled against in a prior trial of its relationship to this conspiracy.

But I'm not penning that.

Lang solved this problem for you to some extent, Judge, because it was just pointed out to me that in the Lang case, which I cited, they went on to discuss the Government contention that Rule 801(d)(2)(e) would overcome the hearsay within hearsay problem and the Rule 602 problem, and the court in that case said, and I will try to abbreviate it, Federal Rule of Evidence 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

The government argues that Carey's conversation with Agent James are admissible as a statement against penal interest under Rule 805--under 804(b)(3).

The government contends that Carey's lack of first-hand knowledge is

no longer a problem since his information was derived from Payola's statement to Carey and that she was purchasing for Lang and Payola's statement was itself admissible under Rule 801(d)(2)(e).

In other words, what the government is saying in that case--I think it is a little different situation--that the hearsay declarant derived information from a co-conspirator which would have been admissible under Rule 801(d)(2)(e).

The court goes on to reject that, and say that there is absolutely no basis for the conclusion that Payola--that the information was derived from Payola or the co-conspirator statement.

I think the problem we have here, Judge, is that we come back to the basic issue. Mr. Botero was confronted with information, the source of which we don't know.

And Rule 602 says that's not admissible testimony in a case. It may not be an issue--I think the court points out, and maybe correctly so, that in the normal 801 case, it may not be an issue, but I reject what Miss Williams says that we never see this problem. In most co-conspirator hearsay situations, you know what the source of the declarant's information is.

For example, consider the testimony of Mr. Campbell independent of this issue. Delores Eirin, who is a co-conspirator in this case, and who has testified through this witness under Rule 801(d)(2)(e), has identified her source--Hernan Botero, in most cases, or Mr. Dodson, in most cases.

Not this situation. Mr. Campbell says that Mr. Restrepo says this, but we don't know the source.

In most co-conspirator hearsay situations, you either know the source from the statement itself, which identifies the source, or the declarant, the out-of-court declarant, is saying something that he personally participated in. Like we can't go through the deal today because the money didn't come, and the money didn't come because I know the money didn't come.

How do we know that in this case? I participated in this deal, and the money didn't come.

We don't know anything about the statement Mr. Restrepo has made, and as Mr. Sonnett points out, we are not just talking about some statement which may or may not be prejudicial to Mr. Botero, we are talking about a statement which identifies him as a drug dealer. That's what the significance of this issue is.

I think the Court recognizes that, and that is why the Court is being so particularly careful with this issue, but I suggest that when analyzing in light of all the factors, there is no way this statement comes into evidence in this case.

THE COURT: Miss Williams.

MS. WILLIAMS: Your Honor, I think that Mr. Shohat has highlighted the Government's position.

Mr. Campbell says Delores Eirin told me that Hernan said this, and Delores is a co-conspirator, and Mr. Campbell says Gary Dodson said Hernan told me this and Gary Dodson is a co-conspirator. So is Losardo Restrepo.

THE COURT: Yes, but what he is saying, Miss Williams, is that Restrepo did not say the money is not coming in because Hernan told me that his boat got seized. That's where he is saying it

differs, that Restrepo said it's not coming in because of the Mariel boats and one of the boats got stopped or got seized, I'm not sure what. What he is saying is Restrepo does not attribute that statement to Mr.Botero.

MS. WILLIAMS:But, Your Honor, I think that if that is a requirement that attendant to every coconspirator statement is X said, or Y said, or Hernan said, or Roberto said this happened, you would defeat the entire purpose of the co-conspirator rule because again, we have--we have the evidence to argue who said it. He was a runner for Hernan Botero, and yes, indeed, he made the deposits dropped, and he was there the first day Hernan Botero was there, and he was there almost every day afterwards. He was Hernan Botero's number one, runner number one, Losardo Restrepo. He was part of this opera-

tion. He knew the flow chart just as well as Alan and Gary, that it was coming in on boats and it was coming in on planes, and the reason it dropped off was because the boats were coming through.

I think it couldn't be any clearer, Your Honor.

THE COURT: Let me suggest this, because what I think we are starting to do is repeat ourselves. Let me suggest that counsel take overnight--you do what you want--I am obviously going to study what you have given me and whatever else I can find, and I'll deal with it from the standpoint of the three-fold argument as I understand is being made: Number one, Mr. Sonnett wants me to revisit the issue in furtherance of the conspiracy; number two, even if revisited and ruled against the defense, they desire for me to apply the Sixth

Amendment test as applied by the Ninth Circuit, not only on the availability of the witness, but on the issue of case by case assessment of reliability; and number three, whether or not there is a 602 application to whatever comes in under 801 so as to preclude the testimony without personal knowledge.

Am I omitting anything, Mr. Shohat?

MR. SHOHAT: Only one element, Judge, and that is on the second point, the case by case confrontation, we think that in addition to the simple confrontation question, there is a 403 question--the weighing of prejudice of this testimony against the fact that it is really something we can't---

* * *

MS. WILLIAMS: Okay. One thing that I did neglect to talk about is the idea of the reliability of the information and whether or not if Mr. Restrepo had said Hernan had told me.

I think identity of ultimate source and reliability, it's not a two-prong test. For instance, if Losardo Restrepo had said, "We're not bringing you deposits because Operation Greenback is cracking down," and we put on agents, and sure enough Operation Greenback was cracking down, we still wouldn't know where he got that information, but we would know it was reliable and we would know that it was a statement made in furtherance of the conspiracy to insure the status of this statement and to let them know we're getting around it.

I don't think identity and reliability are addressed by the courts as one and the same, and I think the defense has proposed an interpretation of it that defeats the purpose of the rule.

MR. SONNETT:If the Government comes in in the morning with some

independent evidence that a boat was seized on or about the time in question, and that it was registered to Hernan or somebody that they can identify as being some agent of Hernan, then I might have to fold my tent. They might be right.

But that's the issue. We don't know who the source is, so if we don't, can we find some other indicia under Duton (phonetic) versus Evans that it is very reliable, and the Government hasn't brought us anything like that, as they would if they brought a Greenback agent in here, given Miss Williams' examples.

THE COURT: All right. I understand the issues.

* * *

THE COURT: Be seated, please.

Since A1A has informed everybody that arguments continue this morning, I certainly don't want to disappoint them.

MR. SONNETT: I am ready for some more high drama, Your Honor.

THE COURT: The Court scurried around and found the case of United States versus Peacock which the Court is of the opinion resolves the issue on the confrontation clause, and I think both sides were notified of that fact early last night. I assume that's the reason Mr. Shohat managed to get to Christie's so early last night. I understood they have a library back in the kitchen, do they?

MR. SHOHAT: Yes, Your Honor, a large steak--

THE COURT: Okay. It seems to me that the only thing that is left unresolved based on the cases as I review them is that from the standpoint of the case of United States versus Amar, at 714 Federal 2d, 38 at Page 254, there is a clear indication, I think by

the Third Circuit that 602 does not in fact apply to 301(d)(2)(e) statements as against being applicable to 803 and 804.

The Court continues to be of the opinion that the statement is in furtherance of the conspiracy.

The Court is of the opinion that the United States versus Peacock, which althouoh was a Fifth Circuit case is actually an Eleventh Circuit panel because it is Unit B of the court would have been authority, anyway since it occurred prior to October 1st of 1981, but which resolves the fact that whether it be the Fifth or the Eleventh Circuit, sides with the line of cases which indicate that there is not a requirement to have the analysis indicated in the Ninth Circuit case insofar as the Eleventh Circuit is concerned, and since Justice White's request in his dissent in Samson versus United States does not

resolve that, obviously this circuit continues to follow the law which only requires, number one, unavailability, which is conceded in this case; and number two, admissibility under 801(d)(2)(e).

That seems to me to leave for disposition solely the issue of whether or not 403 should be applied by the Court in this case under United States versus Cole, which is 755 Federal 2d. 748, obviously the 403 is and can be applied to an 801(d)(2)(e) staement, although as pointed out by the court, speaking through Judge Hatchett, Rule 403 should be applied sparingly.

I am prepared to go forward as far as hearing additional argument based on what I have just indicated.

MR. SHOHAT: Your Honor, it is not my intention to belabor a point which Your Honor has so clearly stated his

view, but I would take personal privilege, or professional privilege, to make an observation with regard to the Peacock case..

There is nothing from the face of the Peacock case which indicates that that panel considered the issue of whether or not 801(d)(2)(e) is a hearsay exception as opposed to a non-hearsay statement which is clearly the distinction drawn in United States versus Amar. Therefore, so that the record on behalf of Mr. Botero is clear, if for nothing else for the unfortunate and hoped against circumstance of an appeal in this case, we urge that for what appears to be the first time in this circuit the issue of confrontation clause having been, I think, fairly clearly focused here, that you consider the reasoning in United States versus Amar as to why 801(d)(2)(e) is not a hearsay exception,

both technically and logically to the history of the rules, to be part of our argument here.

It does not appear, and we don't know because we don't have available to us the transcripts of the oral arguments, if there was one, in Peacock, or the briefs, having had time to get that, and there is certainly nothing from the face of the opinion to indicate anything else but that the court simply took the language of Ohio versus Roberts and then went down what they considered to be hearsay exceptions without stopping to think, wait a minute, is 801(d)(2)(e) in fact a hearsay exception.

For that reason we urge upon the Court the reasoning of United States versus Amar that, in fact, 801(d)(2)(e) is not a hearsay exception.

But let's move on, then, now to the Rule 403 issue.

It is our contention, Judge, that the probative value of the Restrepo declaration is greatly outweighed by the danger of unfair prejudice to Mr. Botero from the statement. The law on Rule 403 is really not complicated. It does require the court-- it is an ad hoc determination on a case by case basis to perform a balancing or a weighing judgmental call based on an analyzie of the probative value of the statement against its damage in an unfair sense to the accused.

Obviously, not all prejudice to the accused is inadmissible because the whole purpose of the Government is to prejudice the accused through the evidence that it presents.

So the issue is unfair prejudice to the accused.

The probative value. No issue in this indictment requires the Government

to prove, no element of any charge in this indictment requires the Government to prove drug smuggling. It doesn't exist in this case. The Government has conceded that both in argument and in opening statement.

It is possible that an argument could be made that Mr. Botero's involvement in drug smuggling would demonstrate some sort of motive for him not to have the CTR's filed, although on this issue it should be clearly pointed out that nothing in anything we have received or in the testimony of Mr. Campbell as it has been proffered or as we have heard, is there an indication that any such motive was tied in to what actually occurred, except perhaps by some form of innuendo or inference.

In that regard, if it is concluded that a drug boat seized, the statement concerning a drug boat seized in the

Mariel Boatlift, is of some probative value in this case, certain observations should be relevant and are relevant to that matter,and that is number one, that the statements will stand alone in thie record as demonstration of Mr. Botero's involvement in drug smuggling. There will be nothing else in the case, as I understand it, to prove this point. There will be no corroboration that a drug boat was, in fact, seized, or that even in a general sense the Mariel Boatlift slowed the flow of drugs into the United States, as I understand it.

There will be no other evidence direct or circumstantial to prove that Dr. Botero was, in fact, in the drug smuggling business.

So that if it is probative of the point, it is also equally probative to note that it will stand alone on the issue, and I think in that light, it has

to be evaluated when we consider the unfairness and the prejudice to Dr. Botero.

And this goes back to the issues we raised yesterday, because they all apply, in our view. First, Mr. Restrepo's source is unknown, the source of his information is unknown and will remain unknown through this trial, taking the strength of the probative value of the information greatly diminished.

Second, it is more than possible there appears to be at least some probability that either Mr. Restrepo was speculating or prevaricating with regard to this statement.

Here's why: The statement is alleged to have been made in May of 1980. The Mariel Boatlift, everybody in this court knows, occurred in May and June of 1980. If it is true that a boat

had been seized during the Mariel Boatlift and that that was the reason why the flow of the money had slowed, that flow of the money would not have slowed until sometime after the boat had baen seized.

So that the actual truth of the fact could be that a question by Mr. Campbell as to why the flow of the money had slowed in May of 1980 could have really no relevance to the Mariel Boatlift, it would have had to have relevance to some slowing of the flow of the drugs prior to the Mariel Boatlift.

So there is some inherent inconsistency in the statement itself that weakens the value of the statement when one analyzes it in light of fact that a all know here.

If it was the Mariel Boatlift that had caused the slowing of the flow of money, maybe a statement to that effect

in mid-June, July or something like that would be relevant, but if a boat had been seized in May of 1980, when the statement had been made, the slowing of the flow of money in the spring of 1980, would not be logically relevant or connected to that fact.

Second, there is an indication that Mr. Restrepo was making a deal of his own in this matter, was working his own angle, and started to use some of the accounts at the Landmark Bank for his own purposes, creating, at least, a possibility and more than mere speculative possibility, that he may be prevaricating on this fact with respect to why it is that Mr. Campbell should no longer expect good business from Mr. Botero but may start--should start considering in a short period of time good business from Mr. Restrepo.

Next, it is entirely possible, Judge, that the prevailing authority in this Circuit, the Peacock case, failed to consider the issue of whether 801(d)(2)(e) is a hearsay exception. And I contend that if that is possible, and we can't tell from the opinion whether that panel stopped and thought of it, I suggest that the 403 issue takes on a new aura of unfair prejudice because it is possible that when confronted with the matter, and they have an opportunity to consider it and consider the well-reasoned view of courts like United States versus Amar, that they may takea different view of it.

And why should Dr, Botero, who has been denied bond throughout this case, it is likely that if he is convicted will not have the opportunity for independent reasons, or possibly not have the opportunity to post bail, in

that circumstances why should he suffer through the lengthy litigation that it is going to take to make that point?

So the unfairness of the prejudice to him by the state of the authority is another reason for the Court to say, now, let me look at this very carefully before I admit this testimony against Dr. Botero, testimony that will stand absolutely alone in this record.

And finally, you will recall yesterday, Judge, that in the initial presentation on this point I mentioned the case of Davis versus Alaska, and that wasn't simply a passing reference to the case, although that particular case kind of got put off to the side as we argued this point.

The unfairness of the prejudice to Dr. Botero on this matter really is a Davis versus Alaska issue. Where do we go on cross examination of this point?

How do we cross examine Mr. Restrepo? We obviously don't. We cross examine Mr. Campbell who says this is what the man said to me, and his answer is don't know anything more about the statement.

How do we do the type of representation and confrontation of Mr. Restrepo that we would ordinarily be entitled to do if that man took the witness stand and gave the testimony?

So that by the very nature of the face that the scope of cross examination will be limited even if we put aside the questions of whether the confrontation clause itself bars the admission of this statement, even if we get past that point, when we are considering in a 403 context and whether the prejudice to Dr. Botero is unfair, aren't we entitled to have considered the fact as relevant to that determination that we are just not going to get the opportunity to really

cross examine this point, and we are stuck with it?

And Davis versus Alaska says that a court shouldn't limit the scope of cross examination unduly on crucial issues in the case, and now Mr. Restrepo's credibility is a crucial issue in the case that we have no way of getting to whatsoever.

And I respectfully suggest that it becomes relevant in the Rule 403 determination.

Is it prejudicial to Dr. Botero? These were the questions of unfairness. Is it prejudicial to Dr. Botero? I don't think that that even needs to be seriously discussed. It stands alone as the only statement in this record, as the only evidence in this record, beyond the innuendo that Mr. Campbell tried to place through this chart and the talking of the word product, is the only

evidence outside of that single statement, the only independent evidence that will say Dr. Botero is in the drug smuggling business.

And I suggest that in light of all the factors, the prejudice is unfair, most respectfully.

THE COURT: Miss Williams.

MS. WILLIAMS: Is the evidence prejudicial to Mr. Botero? Yes, it is. All relevant evidence is inherently prejudicial, as the court in United States versus Gonzalez in the Eleventh Circuit noted.

The question is: Is the prejudice unfair and is it substantially outweighing the probative value of that evidence? And the answer here is no, it does not. The evidence does not stand alone.

Mr. Shohat misspoke when he said that this is not a drug case. The

Government concedes that Mr. Botero is not charged with narcotics violations, and we told the jury that. We have never, never stated this is not a drug case. It is a drug case.

Again, money laundering is the flip side of drug dealing, and that is what we have here.

The evidence doesn't stand alone.

The reason the Government contends Mr. Botero corrupted bank officials into not filing CTR's is because the enormous amounts of cash coming in were drug proceeds. Had they been anything else, he would have had no reason to call upon them not to file the CTR's.

Mr. Botero made reference several times, but initially most pointedly to his product. The reason the Government contends the language was used goes to the nature, again, of the conspiracy. It is a secret agreement to do illegal

acts. The product referred to the drugs being brought in at Hernan Botero's behest and by his runners, one of which was Losardo Restrepo, again an indicted co-conspirator.

The major portion of Mr. Shohat's argument, as I see it, revisited Your Honor's ruling on 801(d)(2)(e) with regard to reliability and confrontation. I will not readdress those points unless Your Honor has further questions.

As regards 403, U, S. v. Gonzalez, U. S. v. Stone, Eleventh Circuit 702 Federal Reporter 1333, the standard in the Eleventh Circuit is that Rule 403 is an extraordinary remedy which should be sparingly used.

And, again, it is not if the evidence is prejudicial. Hopefully, all the evidence introduced is prejudicial in that it serves to support the advocacy of the Government' s position.

It's whether it is unfairly prejudicial and substantially outweighs any probative value. That cannot be so here.

The purpose of the scheme to conceal, as the government contends and as the evidence suggest, is the fact that the proceeds were illicit drugs. There could be no other purpose to hide all that money and, therefore, the statement made by another co-conspirator indicted in this case is relevant and goes to the underlying theory of the Government's case.

THE COURT: All right.

MR. SHOHAT: Very briefly, Your Honor.

Miss Williams' entire argument begs the question, what it comes down to is that because the Government has a theory of the case and it stood up and stated and announced that theory, that makes

the issue relevant because it is their theory of their case. I frankly don't believe that that's the ultimate determination under Rule 403.

The question of probative value isn't because the lawyers who review the case decide that they have this idea about what the evidence ought to show or that idea about what the evidence ought to show. The determination the Court has to make is whether under the charges in the case, under the indictment in the case, the fact of the matter is that evidence is probative.

The Government could stand up here and come uo with some sort of convoluted theory as to why it is logical that perhaps Dr. Botero was involved in smuggling coffee or grain or not reporting income taxes and just say it, and therefore, make it relevant.

The fact of the matter is that the charges that Dr. Botero is facing here have no elements in them which requires the Government to prove drug smuggling.

Now, I have conceded because we are here to get this issue out on the table, that it is possible that there is some probative value on the question of motive for him doing that, and if Miss Williams had limited her argument to that, I wouldn't have a problem. But when you say that the question of motive is an issue, you have to recognize certain facts that motive is not essential to the Government's case. That is certainly relevant to the question of whether or not the probative value outweighs the prejudice, unfairly prejudicial value.

And, second, even if you concede that there is a question of motive and that this does go, as I do, to the issue

of motive to some extent, you must put it in its context.

She started off by saying that the statement doesn't stand alone,and I waited for her to say what other evidence there would be as to why it doesn't stand alone. But as to the bottom line fact that it is the only evidence in this case independent of this so-called chart and the inferences the Government wants to draw from it, it stands alone.

Now analyze that in light of the limitations that are inherent in this evidence that we have raised. That is the ultimate bottom line issue, not the Government's theory in this case.

The biggest fear we have is that the Government is able to convert their theory into the dominant force of this case. That's a big problem, and I respectfully suggest that the determina-

tion under Rule 403 is not what the Government's theory of the case is, but what is actually germane to the charges and the extent to which it is germane.

We concede that to some limited extent, and an argument can be made, but it's germane, but please keep it in context in making the determination.

We cannot cross examine this point.

Whether or not that alone is enough to keep it out under the confrontation clause, it is certainly relevant to the fact that the prejudice from this statement in light of its source being unknown, in light of Mr. Restrepo's possible involvement himself, is relevant, and we ask the Court to please consider these factors.

THE COURT: It is the Court's view that although there is substantial prejudice with regard to the evidence, that that substantial prejudice is not

of such an unfair prejudice as to outweigh the probative value.

The Court is going to allow the testimony on all the grounds that have been asserted as against its admissibility.

* * *

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-6059

(D.C. Docket No. 81-6018)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERNAN BOTERO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(December 16, 1986)

Before VANCE and ANDERSON, Circuit Judges, and KEHOE,* District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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* Honorable James W. Kehoe, U. S. District Judge for the Southern District of Florida, sitting by designation.

Judgment Entered: December 16, 1986
For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: FEB 20 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85 -6059

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERNAN BOTERO,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion December 16, 1986 , 11 Cir., 1986, ___ F.2d ___)
(February 5, 1987)

Before VANCE and ANDERSON, Circuit Judges, and KEHOE*, District Judge.

PER CURIAM:
The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
United States Circuit Judge

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* Honorable James W. Kehoe, U.S. District Judge for the Southern District of Florida, sitting by designation.